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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES	)	
Tariff F.C.C. No. 1	)	**Transmittal Nos. 873, 874, 893**
	)	
Video Channel Service at	)	**CC Docket No. 94-81**
Cerritos, California	)	

To: The Commission

BRIEF ON BEHALF OF
APOLLO CABLEVISION, INC.

APOLLO CABLEVISION, INC.

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SUMMARY

Legal Issue 2 of the Bureau's July 14,1994 Order herein asks whether it is "lawful for [GTE Telephone] to supersede the Apollo contracts with the tariff filing in Transmittal No. 873?" The answer is no.

A series of long-term agreements for Apollo's operation, repair and maintenance of the Cerritos cable television system had been negotiated with GTE Telephone beginning in 1987. At the same time, the parties agreed on a long-term lease, specifically tailored to Apollo's financial and operating requirements. Based on those arrangements, Apollo was awarded a cable franchise by the City of Cerritos, paid GTE Telephone some $6 million pursuant to the parties' agreements, and has been operating the system since 1989. While GTE Telephone temporarily reserved use of one-half of the system bandwidth for its FCC-authorized programming experiments -- and Apollo has also provided complete system and subscriber-related services to GTE Service in that connection pursuant to contract -- the parties initially intended that Apollo would be able to acquire use of that bandwidth at the end of the experimental period.

The Transmittal No. 873/893 tariff varies in many significant respects from the specific terms of the earlier agreements between the parties, and is in direct conflict with the overall structure of future operations contemplated by the parties. The tariff filing was a unilateral, discretionary act by the carrier, based on corporate strategic considerations unrelated to the specific contracts involved, or to the Cerritos market itself. The

Transmittal No. 873/893 tariff is thus an unlawful effort to abrogate the Apollo/GTE agreements. Cf. Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983); Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974), cert. denied, 422 U.S. 1026, reh. den., 423 U.S. 886 (1975). Cf. also MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981).

GTE Telephone's efforts to distinguish those cases, based on the purported absence of private-contract-filing procedures at the FCC, are neither factually accurate nor legally correct. The carrier's reliance on Armour Packing Co. v. United States, 209 U.S. 56 (1908), an Interstate Commerce Commission case, as precedent for abrogating existing private contracts through tariff filings is similarly unavailing. For that precedent vis-a-vis even the ICC has been overtaken by intervening circumstances, and the case's significance vis-a-vis this Commission's procedures is even more diminished. See, e.g., MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990); Sea-Land Service, Inc. v. ICC, 738 F.2d 1311, 1316-18 (D.C. Cir. 1984).

The Commission has made clear that, where tariff filings propose to change long-term service arrangements, carriers must demonstrate "substantial cause" for those changes. E.g., AT&T Communications - Revisions to Tariff F.C.C. No. 2, 5 F.C.C. Rcd. 6777, 7778-79 (Common Carrier Bureau 1990); Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991). Justification of changes to

agreements with customers is even more imperative than changes to agreements with other carriers, given the lack of equal footing as between customers and carriers, and the greater customer deference to (and reliance on) carriers in formulating contract arrangements. To the extent GTE Telephone failed even to offer a showing of "substantial cause" for the disparity between the tariff and the Apollo/GTE contracts here, Transmittal No. 873/893 must be rejected.

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BRIEF ON BEHALF OF
APOLLO CABLEVISION, INC.

Apollo CableVision, Inc. ("Apollo"), a party to the captioned proceeding, by its attorneys, submits the analysis below in response to the Common Carrier Bureau's Order herein released July 14, 1994 (DA 94-784).

INTRODUCTION

In its Order, the Bureau suspended Transmittal No. 873 for one day, and initiated an investigation on a series of factual and legal issues. GTE California Incorporated ("GTE Telephone") was directed to file a "direct case" on a variety of questions, and all parties were invited to file briefs on certain legal issues (Order, ¶¶ 36-37).

In the pages which follow, Apollo will address those matters which concern the relationship of Transmittal No. 873/893 to the long-term agreements between Apollo, on the one hand, and GTE Telephone and GTE Service Corporation ("GTE Service"), on the other. More specifically, Apollo will discuss below (a) the extent to which the Transmittal No. 873/893 tariffs differ from the Apollo/GTE agreements (see Order, ¶ 30), and (b) the lawfulness of GTE

Telephone's effort to supersede those agreements by a tariff filing (Order, ¶ 34, Issue 2). Apollo reserves its right (Order, ¶¶ 36-37) to respond to any of the other parties' August 15, 1994 submissions.

ARGUMENT

I. There Are Significant Disparities Between The Apollo/GTE Agreements And The Transmittal No. 873/893 Tariff

In its Order (¶ 30), the Bureau expressed its uncertainty "whether and to what extent the terms and conditions of Transmittal No. 873 are different from the terms and conditions established by the contractual arrangement between [GTE Telephone] and Apollo." Following are Apollo's comments in that regard.

A. The contracts involved and their interrelationships

Preliminarily, the overall structure and interrelationship of the long-term agreements arrived at between Apollo and both GTE Telephone and GTE Service should be understood. For the Cerritos system was a product of the combined resources of Apollo and GTE -- a joint effort delineated in a series of intimately interrelated contracts over a period of more than 5 years.

As planned by the parties at the outset of the project, GTE Telephone would provide the basic funding for construction of the Cerritos cable television system. Apollo's then-parent (T. L. Robak, Inc.) would design and construct the system.[1/] When the system was constructed, Apollo would be responsible for its opera-

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[1/] See Design Agreement (Attachment 1) and Construction Agreement (Attachment 2), both dated January 22, 1987. See also Amendment No. 1 to Construction Agreement, dated May 26, 1988 (Attachment 3).

tion. In addition to repair and maintenance of the system, Apollo would be the sole interface with subscribers and market the service, connecting new subscribers to the system and providing installation of subscriber premises wiring and converter boxes.[2/]

With respect to provision of cable television services over the system, Apollo was granted a 15-year lease for one-half of the system bandwidth.[3/] Use of the second half of the bandwidth was temporarily reserved for GTE's program experimentation. During the period of experimentation, Apollo would provide all system transmission- and subscriber-related functions for GTE Service.[4/]

GTE Service would terminate its use of the system at the conclusion of the testing period; Apollo would accede to use of that bandwidth through rights of first refusal,[5/] and would proceed with its plans for full 78-channel operations. Consistent with those understandings, GTE notified Apollo as follows in June of 1993:

> Pursuant to Paragraph 21 of the Lease Agreement between Apollo Cablevision, Inc. ("Apollo") and General Telephone Company of California ("GTECA"), as amended by Amendment No. 2 thereto, Apollo has a right-of-first-refusal to the use of the bandwidth capacity in excess of 275 MHz, in the event that such capacity becomes available. As you know, all GTECA's band-

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[2/] See Maintenance Agreement dated January 22, 1987 (Attachment 4), as amended May 3, 1991 (Attachment 5); Agreement for the Installation of Customer Premises CATV Equipment dated November 16, 1989 (Attachment 6), as modified by the CATV Installation Agreement dated July 23, 1990 (Attachment 7).

[3/] Lease Agreement dated January 22, 1987 (Attachment 8), as amended May 26, 1988 (Attachment 9), June 19, 1989 (Attachment 10), and May 3, 1991 (Attachment 11).

[4/] See Service Agreement dated November 16, 1989 (Attachment 12), as amended November 18, 1991 (Attachment 13); Enhanced Capability Decoder (Converter Box Agreement dated November 16, 1989 (Attachment 14).

[5/] See Attachment 8, ¶ 21; Attachment 10, ¶ 8.

> width capacity in Cerritos in excess of the 275 MHz already being used by Apollo, is currently being used for experimental purposes by GTE companies under the Lease Agreement between GTECA and GTE Service Corporation ("GTESC").
>
> As you are also aware, this experimental use of broadband capacity - to the extent it involves GTE affiliates in testing of video programming services or in flexible operational or non-tariffed contractual interaction with Apollo - requires a special waiver from the FCC. This FCC waiver grant expires by its own terms in July 1994, unless GTE demonstrates a need to conduct further tests in Cerritos and requests an extension of the waiver for that purpose. GTE has reviewed the status of the Cerritos test bed and has decided not to try to pursue additional experimental activities. Therefore, GTESC will not continue full usage of its bandwidth capacity after the expiration of the waiver grant, for testing or for any other purposes for which permission for a waiver extension from the FCC would be required.
>
> As a result, 275 MHz of broadband capacity (on the same combination of coaxial and fiber facilities through which Cerritos customers are currently served) will become available to GTECA in 1994, no later than July. Apollo Cablevision, Inc. is hereby offered the right-of-first-refusal to use this capacity, upon its availability and pursuant to a channel service tariff rate of $95,265 per month.[6/]

It was not until the Fall of 1993 that GTE Telephone reversed direction, and sought to abort Apollo's contract entitlements.

B. The effect of Transmittal No. 873/893 on the overall business structure agreed on

In the section which follows (pp. 6-8), Apollo has identified a number of ways in which the specific tariff wording departs from the earlier contract understandings. But beyond conflicts in verbiage, it should be emphasized that the carrier's

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[6/] Letter dated June 29, 1993 from R. A. Cecil, GTE Telephone Operations, to Thomas Robak, Apollo CableVision. The parties thereafter began negotiations over an appropriate charge for the additional bandwidth.

tariff proposal conflicts with the overall business structure agreed on among Apollo, GTE Telephone and GTE Service.

As stressed in earlier Apollo filings, all of the parties' agreements were interdependent and were executed in reliance on the existence and content of the others.[7/] For example, Apollo's agreement to the monthly charges provided in the Lease Agreement was based in part on the offsetting revenues it was to receive under the Maintenance Agreement for the first five years of the lease. And Apollo's $6 million lump sum lease prepayment to GTE Telephone assumed that offset. The tariffs hold the lease charges constant, while eliminating maintenance revenues.[8/]

Moreover, GTE Telephone's tariff scheme to split the system into two parts flatly contradicts the ultimate operational structure the agreements contemplated. For the parties always intended that, at the conclusion of GTE's program experimentation, Apollo would have the opportunity to add that bandwidth to its partial operations, and Cerritos would have a fully functioning 78-channel system. GTE Telephone's tariff approach, however, summarily arrogates to the carrier most system operations and maintenance,

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[7/] The intimate interrelation of the agreements is evidenced by the simultaneity of their execution. Thus, the Design and Construction Agreements, and the initial Lease and Maintenance Agreements, were all executed simultaneously in 1987 (see Attachments 1, 2, 4, 8). Amendments of the Construction and Lease Agreements occurred on May 26, 1988 (see Attachments 3, 9). On November 16, 1989, the Service Agreement and converter-box-related agreements with GTE Service were executed simultaneously with the agreement for subscriber premises wiring and equipment with GTE Telephone (see Attachments 12, 14, 6). And further amendments to both Maintenance and Lease Agreements were signed May 3, 1991 (see Attachments 5, 11).

[8/] GTE Telephone has argued that while Apollo will indeed lose maintenance revenues, GTE Telephone's assumption of maintenance will reduce Apollo's costs by at least as much. No harm, no foul. However, as indicated below, the tariff relieves Apollo of only a part, not the entirety, of the repair and maintenance responsibilities which the earlier contracts covered; Apollo will thus continue to incur a variety of costs which the contracts covered, but the tariff offering does not.

divides the system operationally in half, and establishes a discrete competitor to Apollo in that second half.[9/]

In these and other respects, the effect of the tariffs is to work fundamental changes in the complex of agreements -- which have provided revenues as well as exacting costs, and were drawn for entirely different business objectives -- on the basis of which Apollo decided to initiate its Cerritos cable service, and on the predictability of the terms of which it relied.

C. Specific disparities between the Transmittal No. 873/893 tariff and the Apollo/GTE Telephone agreements

Following is an effort to more specifically highlight particular conflicts between the tariff wording and the contractual

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[9/] The effects of the tariff scheme have already been felt in non-tariff ways. For example, a single billing system, utilized since the initiation of operations, has been developed and run by Apollo for itself and GTE Service. The tariffs have prompted GTE Service to try to establish a second, parallel billing system. The problems already encountered in that regard have been significant, and the additional disruption and costs to Apollo -- none of which were contemplated by the agreements -- have been substantial.

The tariffs' attempt to divide the system has also created operational problems which would not exist under the contract arrangements. For example, the effort to use a single converter box to provide two discrete, competing services has yielded just the type of problems Apollo had warned of earlier. (See, e.g., letter herein dated June 29, 1994, from Edward P. Taptich, Esq. to A. Richard Metzger, Acting Chief, Common Carrier Bureau, pp. 8-10.) Because of GTE Service's determination to now have independent operational control, Apollo's delivery of pay-per-view ("PPV") events has been seriously disrupted. Among other things, Apollo subscribers were earlier able to order PPV simply by way of their remote controllers. Now, because of the system consequences of GTE Service's separate billing function demands, Apollo cannot capture decoder information concerning which subscribers have ordered PPV events with those controllers; it has lost revenues because it is now only able to track and bill subscribers who order PPV events by telephone.

Such operational problems -- and the injury to Apollo they represent -- are not ones which can be related to specific words in the tariffs. But they are nonetheless a consequence of the tariffs' change of the contract arrangements.

agreements of the parties. While these are not the entirety of the inconsistencies, they do represent a variety of clear conflicts:

Transmittal No. 873/893	Parties' Agreements
§ 18.3.1 states that GTE Telephone will "maintain the [system] facilities and equipment" between the "point[s] of termination" at the head-end and the subscribers' premises.	The Maintenance Agreement provides that Apollo will "maintain and repair the entire 550 MHz CATV system, which connects the head-end, coaxial distribution system, including "drops," decoder/converter boxes, remote control units, Telephone Interface Modules ("TIMs") and inside (customer premises) wiring." (Attachment 5, ¶ D.)
NOTE: Under its contracts, Apollo was to be compensated for a portion of its repair, maintenance and installation costs for a 5-year period, with such functions to be cost-free thereafter. The tariff works two substantial changes: (1) It withdraws revenues from Apollo; (2) It relieves Apollo of repair and maintenance activities (and thus costs) for only that portion of the system covered by the tariff; Apollo is left to bear any costs associated with the head-end and subscriber premises portions of the system -- portions excluded from the carrier's responsibilities in the tariff.[10/]	
§ 18.3 restricts transmissions to "analog video and audio signals" (emphasis added).	The parties' contracts contain no such limitations; use of digital techniques to expand channel capacity contemplated by the parties, for example, was not barred.
§ 18.3 imposes a requirement that all de-encryption of signals take place at subscribers' premises, and that "decoder/converter box[es]" be utilized for subscriber reception.	The parties' contracts contain no such limitations; other types of "compatible equipment" than converter boxes may be used by subscribers in the future.

[10/] Apollo does not maintain that GTE Telephone itself must provide subscriber premises equipment. It is, however, contractually responsible for whatever costs Apollo incurs beyond those contemplated by the agreements as a result of the carrier's new approach. The Description and Justification (p. 8) which accompanied Transmittal No. 873 itself estimated $13,500 per month as the amount attributable to GTE Telephone's agreement to provide converters during the life of the Lease Agreement.

§ 18.3.3(D) requires Apollo, cost-free, to receive subscriber complaints, to determine whether the problem is in the carrier's facilities and, if so, to then notify the carrier.	The Maintenance Agreement compensation covered Apollo's costs in such regards.
§ 18.3.3(F) imposes on Apollo the burden (and hence costs) of assuring that customer premises equipment -- even if it is provided by the carrier or a third-party supplier -- will not "interfere with or harm any service" provided by carrier.	The Maintenance Agreement granted Apollo control over, and covered costs for, receiving equipment performance.
§ 18.3.3(G) requires Apollo disclosure to the carrier of such information as "the profits of households" using Apollo's services, and "changes to service levels."	The contracts do not require disclosure of such commercially sensitive information; such disclosure now to the very entity asserting a right to compete with Apollo is flagrantly anticompetitive.
§§ 18.4(A) and (A)(2) leave unclear Apollo's right to use 275 MHz of bandwidth, irrespective of the number of channels.	The Lease Agreement provides an unqualified right to 275 MHz of bandwidth. (See, e.g., Attachment 1, ¶ 1.)
§ 18.4(A)(3) reflects GTE Telephone's non-competition agreement with Apollo (see Lease Agreement 2, ¶ 7).	The Enhanced Capability Decoder (Converter Box) Agreement with GTE Service, however, also includes a noncompetition provision (Attachment 14, ¶ 2(d)); the tariff fails to include a foreswearing of competition with Apollo through the carrier's affiliates.
§ 18.4(A)(4) purports to grant Apollo a right of first refusal on any "available" system bandwidth in excess of 275 MHz.	The Lease Agreement contains both that entitlement and a first refusal right to GTE Telephone's Fiber Network Facilities. (Attachment 10, ¶ 8.)

NOTE: Whether this tariff provision has any efficacy for Apollo is unclear. Given the Bureau's notion that the Transmittal No. 893 alterations made the tariff offering generally available, there appears to be a conflict between a general holding out to the public and a reservation of bandwidth availability for Apollo.

§ 18.4(A)(6) imposes a $112.50 charge for each new subscriber connection, and a $37.50 charge for each "subscriber reconnect."	The CATV Installation Agreement provided Apollo reimbursement for subscriber drop installations. (Attachment 7.) The financial effect of this change on Apollo was discussed in Apollo counsel's June 29, 1994 letter to the Bureau herein.

D. The differences between the Transmittal No. 873/ 893 tariff and the Apollo/GTE Service contracts

Because it believed the converter boxes Apollo had ordered for the system would not be advantageous for the NVOD services it had in mind, GTE Service, in November of 1989, prevailed on Apollo to substitute a different converter box. (See Attachment 14.) In an agreement to reimburse Apollo for any additional expenses or liability involved, GTE Service also agreed not to compete with Apollo during the term of its lease with GTE Telephone:

> [GTE Service] agrees not to compete with Apollo, or any permitted successor or assignee, in the provision of Video Programming, as that phrase is used in the Cable Communications Policy Act of 1984, in the City of Cerritos during the term of the Lease Agreement dated January 22, 1987, as amended, between GTE California Incorporated and Apollo (including any extension thereof not in excess of seven (7) years beyond the initial term), ...[11/]

A simultaneously-executed "Service Agreement" between Apollo and GTE Service to implement the latter's Center Screen service (as amended in November, 1991) included specific protections for Apollo in that regard. In addition to clarifying the comprehensive activities Apollo would undertake for GTE Service vis-a-vis system subscribers, that agreement also made clear that GTE Service would not conduct its experimentation in ways which would adversely affect Apollo's enterprise. (See Attachment 12.) The agreement's emphasis was the potential for injury to Apollo's sale of its planned (and commercially customary) premium service offerings.

[11/] See attachment 14, ¶ 2(d). While GTE Service notified Apollo on June 24, 1994 of its intention to terminate the Service Agreement, the non-compete provisions survive such a termination, and are still applicable. The efficacy and propriety of GTE Service's notification will be dealt with in a different forum.

As characterized in the Bureau's Order,[12/] Transmittal No. 873/893 now purports to represent an indiscriminate offering to others of one-half the system bandwidth for "Video Channel Service" -- defined at tariff Section 18.1 as "broadband video and information services including, but not limited to, cable television and enhanced video services" in Cerritos. Such an unconditioned, competitive use of channels 40-78 is directly at odds with the limitations earlier agreed on.

II. Transmittal No. 873/893 is an Unlawful Effort to Abrogate Earlier Long-Term Agreements Between the Parties

That the Transmittal No. 873/893 tariff is intended to supersede the Apollo/GTE agreements is not in dispute. Indeed, as GTE Telephone's transmittal letter itself expressed it:

> GTE California is converting its existing video transport agreement with Apollo, the local franchised cable television operator in Cerritos, from a private contractual arrangement to a tariffed common carrier service . . . .

(GTE Telephone Transmittal No. 873 letter dated April 22, 1994.)

It is well settled law, however, that a carrier -- be it a communications carrier, a gas pipeline provider, or an electric utility -- may not use a tariff to revise the terms of a contractual arrangement with a customer. Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (construing Federal Power Act);United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956) (construing Natural Gas Act); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983) (construing Commu-

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[12/] Order, p. 32 ("Transmittal No. 893 [removes] language from Transmittal No. 873 limiting the offering to one customer, and to make the offering generally available").

nications Act); Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974) ("Bell Telephone"), cert. denied, 422 U.S. 1026, reh. den., 423 U.S. 886 (1975) (construing Communications Act). As observed by the Court in MCI Telecommunications Corp. v. FCC, 665 F.2d 1300, 1302 (D.C. Cir. 1981) ("MCI"), such precedents "restrict[] federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts."

The Commission itself endorsed this fundamental principle in Bell System Tariff Offerings (Docket 19896), 46 F.C.C.2d 413, 432 (1974), aff'd, Bell Telephone, supra, stating:

> Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In light of the court decisions interpreting comparable legislation, it appears that, except as expressly modified by statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act . . . . [I]t is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.[13/]

[13/] As noted earlier, GTE Telephone's tariff would alter the terms of both the transmission service and the maintenance service elements of its contract arrangements with Apollo. Sierra-Mobile, however, prohibits alteration by tariff of the terms of carrier-customer maintenance agreements in this context to the same extent that it prohibits alteration by tariff of the terms of preexisting carrier-customer transmission agreements.

Contrary to GTE Telephone's earlier suggestions that it has some inherent right to assume maintenance of the Cerritos system regardless of earlier agreements, and that the Commissions's authority does not extend to such matters, see Chesapeake and Potomac Telephone Co., 57 R.R.2d 1003 (1985), recon. denied, FCC 85-279 (1985), where the Commission approved the construction, long-term leasing, and maintenance of cable distribution facilities by C&P Telephone on behalf of District Cablevision, Inc., the franchised cable operator in Washington, D.C. As in the case of GTE Telephone here, the authority granted C&P in that case expressly allowed it to "construct and maintain broadband transport facilities." Id., 57 R.R.2d at 1009 (emphasis added). In its decision, the Commission rejected arguments that "the Commission's authority is limited to the transmission function of interstate and foreign communications, rather than encompassing any and all

(continued...)

GTE Telephone has argued, however, that the Mobile and Sierra cases are inapplicable because their holdings assume "a regulatory scheme whereby both tariffs and private contracts may properly co-exist," while "the Communications Act does not permit the filing of private contracts of the type at issue." (GTE Telephone "Consolidated Reply to Petitions to Reject or Suspend Tariffs," filed June 1, 1994 ("GTE Reply") at 12.) Instead, the carrier argues, the "controlling" law here is the 1908 holding in Armour Packing Co. v. United States, 209 U.S. 56 (1908), which is said to permit the abrogating of "existing contractual relationships" through tariff filings. (GTE Reply, pp. 12, 13.) Apollo submits that the carrier's position does not withstand scrutiny.

A. GTE Telephone's efforts to distinguish the *Sierra-Mobile* precedents are unavailing.

According to GTE Telephone, because the Sierra-Mobile doctrine is premised on the simultaneous existence of regulatory procedures for filing both tariffs and contractually established terms of service, it is inapplicable here because neither the Commission nor the Communications Act permits carriers to file the terms of customer agreements with the Commission. (GTE Reply at 12.) The carrier's fundamental premise, however, -- that carriers may establish the terms of service to customers only by filed tariffs, and not by unfiled contracts -- is no longer valid. As the U.S. Court of Appeals said in MCI Telecommunications Corp. v. FCC, 917 F.2d 30

[13/](...continued)
equipment or facilities that could be used as part of a communications link," id., 57 R.R.2d at 1004.

(D.C. Cir. 1990) ("Tariff 12 Appeal"), when addressing a position similar to GTE Telephone's,

> Under [Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984)], rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not per se violate the Communications Act if the rates are filed with the FCC. IDCMA's principal argument focuses on this last requirement: it claims that the FCC, unlike the ICC, either cannot establish or has not appropriately established the procedural mechanism for filing private contracts found necessary in Sea-Land. This misses the point. What is involved here is not the filing of contracts qua contracts but the filing of tariffs based upon contracts. There thus is no need for the FCC to devise a new means for public filing of the rates for Tariff 12 services; the filing occurs through the normal tariffing process. And there is no procedural bar to a carrier's formulating a proposed tariff based upon negotiations with a potential customer.

Id., 917 F.2d at 38 (footnotes omitted; emphasis in original), accord, Competitive Common Carrier Rulemaking (Further Notice of Proposed Rulemaking), 84 F.C.C.2d 445, 481-84 (1981) ("We believe the Act contemplates the use of contracts for non-carrier customers as well [as carrier customers]").

Contractually set rates and terms can be filed with the Commission in contract-based tariffs; therefore, no meaningful distinction exists between carrier-carrier agreements (which have traditionally been filed, and as to which the Sierra-Mobile doctrine has been applied), and carrier-customer agreements where the terms of such agreements are embodied in filed tariffs.[14/]

[14/] American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980), is not to the contrary. The basis for the Court's reasoning was the fact that, although Section 211(a) of the Communications Act requires carriers to file inter-carrier agreements, no provision of the Act requires carrier-customer agreements to be filed. Id., 643 F.2d at 823. The Court specifically declined to interpret the breadth of Section 211(b) of the Act, which permits the Commission to require carriers to file their agreements with

(continued...)

Indeed, as an equitable matter, the case is stronger for barring carriers' arbitrary changes to earlier agreements with customers than it is for interfering with prior carrier-to-carrier agreements. In the latter circumstance, the parties are on equal footing, by history familiar with the implications of communications legislation and regulation for business arrangements being negotiated. Where major carriers are negotiating with small to mid-size customer-entrepreneurs, however, not only are the parties' experience unequal, but the customer's typical deference to the carrier's expertise is great, and its capacity for being lulled into false assumptions that much greater.

Here, for example, Apollo was continuously led to believe that the contracts would be valid and enforceable. As with the content and tone of the parties' negotiations, the documents signed emphasized the temporary, experimental nature of GTE's use of system bandwidth.[15/] The agreements repeatedly noted that terms

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[14/](...continued)
customers. Id., 643 F.2d at 823 n.5. Instead, the Court reasoned that,

> while Section 211(b) arguably may authorize the Commission to provide for the filing of contracts such as those here at issue, the Commission has not yet exercised such authority, if any, as it may have in this respect. . . . The difficulty here is precisely that, because no such provision [as Section 211(a)] applied to this contract, the clause in dispute was made available neither to the public nor the Commission. Hence, the disputed clause is just the kind of unpublished contractual alteration of a tariff which the Act condemns.

Id., 643 F.2d at 823, 826. As indicated herein, however, the Commission has since exercised its authority to honor parties' contractual arrangements.

[15/] See, e.g., Lease Agreement, ¶ 18 (Attachment 8); Lease Agreement, Amendment 1, ¶ D (Attachment 9); Service Agreement, ¶ 4 (Attachment 12).

arrived at were designed to meet Apollo's business interests and objectives, and to avoid injury to them.[16/]

With respect to the propriety of GTE Telephone's entry into private contracts to implement the parties' plans, the documents expressed the understanding --

> that the bandwidth capacity subject to this Agreement is provided on a non-common carrier basis, individually negotiated and tailored to meet the particular needs of [Apollo] and characterized by a long-term Lease with a customer expected to operate a stable business.

Lease Agreement (Attachment 8), ¶ 19.[17/] Similar, non-contract assurances of the consistency of the agreements with regulatory requirements were also furnished Apollo by GTE.

Regulatory authorities with knowledge of the Apollo/GTE agreements took no steps inconsistent with the GTE Telephone views expressed to Apollo. Thus, the City of Cerritos on March 4, 1987 -- based on the parties' agreements -- granted GTE Telephone a

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[16/] See, e.g., Lease Agreement, Amendment 2, ¶ F (Attachment 10):

> The parties agree that Apollo's essential business objective and economic expectation in the Lease is the provision of Video Programming to its customers in the City." [The substitution of GTE-referred converter boxes] is not intended to change Apollo's control over, or essential expectation of, its provision of Video Programming . . . .

See also Service Agreement (Attachment 12), ¶ 11 (parties agree to take steps to avoid injury to Apollo's offerings by GTE's experiments); License Agreement Amendment 1 (Attachment 13), ¶ 2 (Apollo priority right to satellite-delivered programming clarified.

[17/] Further reassuring were contract provisions that, even if GTE Telephone's participation in system use were to be disallowed by the Commission or the courts,

> this may require further revision of the Lease and this modification. The parties agree to negotiate any further modifications in good faith. Such negotiations shall be based on the essential business objectives and economic expectations of the parties . . . .

Lease Agreement, Amendment 2 (Attachment 10), ¶ 4.

franchise to construct a cable system (Ordinance No. 658), and granted Apollo a franchise "to operate and maintain a cable communications system" in Cerritos (Attachment 15, Section 3).

One year later, over a variety of objections, GTE Telephone's application for Section 214 authority to construct the system was granted by the Commission's Common Carrier Bureau;[18/] fully aware of the Apollo/GTE Telephone agreements, the Bureau viewed the need for an illustrative tariff "moot."[19/] Also aware of the agreements involved, the Commission affirmed the Bureau's decision and authorized the Cerritos system's construction and operation.[20/] While the protestants again argued the need for tariffing,[21/] no such requirement was imposed, and the various specific conditions attached to the Section 214 grant contained no obligation to operate pursuant to tariffs.

In short, there was every reason for Apollo to have accepted GTE Telephone's assurances and to have relied on them. There is no policy reason why, having induced that reliance, GTE Telephone should be permitted summarily to alter its obligations to Apollo through the expedient of a discretionary tariff. And as indicated above, legal precedent lends GTE Telephone no support.

[18/] General Telephone Company of California, 3 F.C.C. Rcd. 2317 (Common Carrier Bur. 1988).

[19/] Id., 3 F.C.C. Rcd. at 2326.

[20/] General Telephone Company of California, 4 F.C.C. Rcd. 5693 (1989).

[21/] E.g., id. at 5695 (¶ 13), 5697 (¶ 30).

B. GTE's reliance on *Armour Packing* is misplaced.

Preliminarily, it should be recalled that Armour and the line of cases thereunder interpreting the tariffing requirements of the Interstate Commerce Act ("ICA") are premised on the fact that the ICA did not provide a procedure for carriers to file contractually established rates. As the Court of Appeals in Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984) ("Sea-Land"), explained, however, the ICA did not prohibit such filings; there simply was no procedure for making such filings, until the Interstate Commerce Commission ("ICC") adopted such a procedure in 1978. Id., 738 at 1317-18. Once a procedure for filing contractually established rates and terms was subsequently established, there was no impediment to carriers' establishing rates and terms of service through contract, provided that such rates and terms were made available to all shippers ready, willing, and able to meet the terms and pay the rates -- the fundamental obligation of every common carrier. Id., 738 F.2d at 1318; accord, Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 807-808 & n.18 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

Armour, therefore, is not the controlling precedent here. First, in the context of the ICA itself, the basis for the Armour Court's permitting tariffs to abrogate contract arrangements is generally recognized to have been rendered obsolete by intervening marketplace and regulatory changes.[22/] Indeed, the court in Sea-

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[22/] For a discussion of the deregulatory environment which has diminished the import of Armour even in the freight transportation context, see generally Maislin Industries, U.S. v. Primary Steel, Inc., 110 S. Ct. 2759, 2777 (1990) (Stevens and Rehnquist, dissenting).

Land directly eschewed the vitality of the aged Armour principle 10 years ago (738 F.2d at 1316-18):

> [C]urrent law no longer considers contract rates to be per se violations of the common carrier duty of nondiscrimination. To be sure, there was a time when one might have drawn the opposite conclusion, and the case law cited by petitioners is illustrative of that earlier period [specifically citing Armour] . . . . Since 1978, however, the Interstate Commerce Commission has held that contract rates are not inherently discriminatory, provided that the carrier offering them makes them available to all similarly situated shippers of like commodities . . . .
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> The uncertain legal status of private contracts prior to 1978 stemmed largely from the ambiguity of the Supreme Court's holding in Armour Packing. There the Court reviewed the criminal convictions under the Elkins Act which prohibits common carriage of property at less than the applicable published rate on file with the Interstate Commerce Commission . . . .
>
> In light of . . . intervening developments, we find the inference unjustified that the Supreme Court in Armour Packing intended to condemn contact rates as inherently discriminatory. The more likely explanation for the Court's observation that private contracts could not be filed, 209 U.S. at 81, 28 S. Ct. at 435, was the absence of any procedural mechanism for doing so in 1908. Other decisions considering this aspect of the Armour opinion have reached the same conclusion. See, e.g., United Gas Pipeline v. Mobile Gas Service Corp., 350 U.S. 332, 345, 76 S. Ct. 373, 381, 100 L. Ed. 373 (1956); American Broadcasting Cos. v. FCC, 643 F.2d 818, 822-26 (D.C. Cir. 1980). To the extent that such procedural concerns underlay the Court's observation, the Interstate Commerce Commission laid them to rest in its 1978 Change of Policy by specifically providing for the filing of contract rates under normal Commission procedures . . . . Contract rates duly filed with and approved by the Commission, of course, satisfy the central concern of the Armour Court that prices charged for transportation accord with applicable rates on file with the ICC . . . . Because the rate applicable to a contract shipper is the rate specified in its contract on file at the Commission, and not that set forth in the carrier's general noncontract tariffs, . . . Armour Packing properly read provides no support for the proposition that contract rates approved under appropriate Commission proce-

> dures inherently conflict with a common carrier's duty of nondiscrimination. [Footnotes omitted.]

The Sea-Land ruling has since been embraced both by the Commission, Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880, 6 F.C.C. Rcd. 5880 (1991) (at 5902-03 & accompanying notes), and by courts addressing Communications Act issues, e.g., MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990).

Second, even if Armour were able to be read to permit ICA tariffs to abrogate contractual terms, the Communications Act cannot be so interpreted. As the Court of Appeals for the District of Columbia Circuit wrote in MCI, supra, "the Communications Act of 1934 grants the FCC no authority to authorize unilateral changes in agreements." 665 F.2d at 1302. (See also discussion, supra, at pp. 12-14.)

III. Even if Transmittal No. 873/893 were Otherwise Lawful, GTE Telephone Has Failed to Demonstrate "Substantial Cause" for Departing from Earlier Contract Terms

Where filed tariffs reflect long-term service arrangements similar to private commercial contracts, carriers proposing subsequent changes in their terms must make a "showing of substantial cause" to support those revisions; failure to do so will result in rejection of the proposed tariff revisions. AT&T Communications - Revisions to Tariff FCC No. 2, 5 F.C.C. Rcd. 6777, 6778-79 (Chief, Common Carrier Bureau 1990). Cf. RCA American Communications, Inc. v. FCC, mem. op., D.C. Cir. No. 81-1558 (Mar. 8, 1984), 731 F.2d 996 (table). As noted in RCA American Communications, Inc., 86 F.C.C.2d 1197, 1201-02 (1981):

> In balancing the carrier's right to adjust its tariff in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements, we conclude that the reasonableness of a proposal to revise material provisions in the middle of a term must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time. If a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable. [Footnote omitted; emphasis added.][23/]

Where a carrier proposes to alter or abrogate by tariff the terms of non-tariffed services earlier provided under contract, the need for meeting the "substantial cause" test is even more compelling. For the carrier's private customer is even more lulled into reliance on the contractual certainties to which that customer is accustomed in its other negotiated commercial dealings. (See discussion, supra, at pp. 16-18.)

In this case, Apollo's business relationship with GTE Telephone and GTE Service is the product of individually negotiated, long-term agreements for facilities and services specifically tailored to the parties' requirements over a number of years. Apollo's lease and maintenance of the facilities was initially agreed to as long ago as January 1987, and the parties' agreements in those respects were specifically acknowledged by the Commission in its 1989 grant of experimental Section 214 authority.

While GTE Telephone directly acknowledged that Transmittal No. 873 was intended to "convert" the existing agreements with Apollo "from a private contractual arrangement to a tariffed common

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[23/] The Commission has specifically applied the "substantial cause" test to various carrier services provided under tariff to the cable television industry. See, e.g., Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991).